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No. 85-825

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

MAVIS DAY,

Petitioner,

v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Whether a public employee whose speech activities admittedly involved matters of purely private concern has a cognizable First Amendment claim under the Petition Clause because she chose to clothe those activities in the form of a grievance.

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South Park Independent School District respectfully submits its brief in opposition to the petition of Mavis Day for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on August 16, 1985.

OPINIONS BELOW

The district court rendered oral findings, which are printed herein as Appendix B (15a-18a). The opinion of the court of appeals is reported at 768 F.2d 696 (5th Cir. 1985), and is reprinted herein as Appendix A (1a-14a).

JURISDICTION

The court of appeals entered judgment on August 16, 1985, Appendix C (19a). No petition for rehearing was filed. This Court has jurisdiction to review the judgment by certiorari pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Constitution, Amendment I, provides in pertinent part as follows:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT OF THE CASE

The employment contract of Petitioner Mavis Day, an untenured white female English teacher, was not renewed by Respondent South Park Independent School District, Beaumont, Texas, upon its expiration at the conclusion of the 1979-80 school year, as a result of a district-wide reduction in staff. [R.Vol. 3 (Jan. 24), 71-74; R.Vol. 3 (Jan. 25), 9, 18-19]. Contending that the nonrenewal was in retaliation for her having attempted to invoke the school district's formal grievance policy as a means of changing certain performance evaluation ratings given her by her building principal, Petitioner brought suit pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 1331(a) and 1343, alleging violations of First and Fourteenth Amendment rights.

In December, 1979, school district building principals had been advised that due to an anticipated loss of enrollment it would be necessary for the 1980-81 school year to reduce by ten the number of teachers district-wide. [R.Vol. 3 (Jan. 24), 71-74]. Included in the reduction in force would be one English teacher at Petitioner's school. [R.Vol. 2, 38-39, 44, 66-67; Vol. 3 (Jan. 24), 72-73, (Jan. 25), 20]. This necessity was confirmed by administrators in January, 1980, due to state funding limititions. [R.Vol. 3 (Jan. 25), 9, 18-19]. On March 27, 1980, Respondent board of trustees determined not to offer contracts to Petitioner or to a number of other teachers, pending further study of staffing needs. (P.Exh. 22). It was hoped that retirements and resignations might produce sufficient attrition to obviate nonrenewals.

The next day Petitioner wrote to her building principal, attempting to invoke level one of the school district's formal grievance procedure; her complaint addressed certain unsatisfactory ratings he had given her in her annual performance evaluation. (P.Exh. 1,11). Although Petitioner had received satisfactory ratings, with positive comments, in eighteen of the twenty-four categories, in six other categories relating to attitude and relations with colleagues she had received unsatisfactory ratings. (2a). Some of the principal's comments were: "a [l]ack of control in working with peers is often evident," and "[Petitioner] does not always recognize the value of group effort. Often this causes conflicts." (2a). Receiving no response from her principal, Petitioner on April 14, 1980 wrote to the superintendent in an effort to invoke level two of the grievance procedure regarding her dissatisfaction with the performance evaluation ratings. (P.Exh. 13). On April 23, 1980, the superintendent responded in writing to Petitioner, pointing out that disagreements about the contents of one's performance evaluation were not grievable under policy "because it is the specific duty of the building principal to evaluate the instructional staff"; the superintendent suggested that Petitioner prepare a written rebuttal to the building principal's evaluation "so that it may be attached to the evaluation instrument." (P.Exh. 14). Such rebuttal is standard school district procedure in situations involving dissatisfaction with performance evaluation ratings. [R.Vol. 2, 66, 135; Vol. 3 (Jan. 24), 54-55]. Petitioner declined to submit a rebuttal. (R.Vol. 2. 110-111). On April 25, 1980, Petitioner wrote to the school board president, requesting that her performance evaluation be submitted to arbitration, the third and final step in the local grievance procedure. (P.Exh. 15). On May 7, 1980, counsel for the school district, responding for the board president, wrote to advise Petitioner that disagreements concerning performance evaluation ratings were not formally grievable under policy and could not be submitted to arbitration. (P.Exh. 16).

The school district's grievance policy defines a properly assertable formal grievance as "a petition by a teacher or group of teachers based upon an alleged violation, misinterpretation or inequitable application of any existing policies, rules, or regulations of the school district, but shall not include a petition based upon disciplinary action not based directly on policies of the Board." (P.Exh. 1, 1). District policy does not permit invocation of the formal grievance procedure to contest performance evaluation ratings because only the building principal who views a teacher's work on a daily basis can make such determinations; central administrative officials or a board of arbitration are not in a position to assess the correctness of the teacher's point of view on ratings as opposed to that of the building principal. (4a). The formal grievance procedure might be involved only if the building principal violated board policy in the process; for examples, by refusing to evaluate a teacher, or by failing to use the approved evaluation form, or by refusing to sign the evaluation. (4a). In her letters to the building principal, superintendent, and board president, Petitioner made no allegations of the sort specified in the policy, referring only to her disagreement with certain of her evaluation ratings. (P.Exh. 8, 11, 13, 15).

By May, 1980, attrition had not produced positions for Petitioner and others for the 1980-81 school year. (R.Vol. 2, 44). On May 22, 1980, at its last meeting of the school year, the board of trustees determined not to offer Petitioner a contract due to the necessity of reducing the number of English teachers at her school. Seniority was the principal criterion used in determining which teacher would not be renewed [R.Vol. 3 (Jan. 24), 21-22]. Petitioner was the least senior among the English teachers whose contracts expired in 1980. [R.Vol. 2, 54; Vol. 3 (Jan. 24), 81, 86, 105]. No other reason for Petitioner's nonrenewal was considered or discussed by the board [R.Vol. 2, 72; Vol. 3 (Jan. 25), 24]. Two other teachers at Petitioner's school who had attempted to assert performance evaluation rating grievances

during the 1979-80 year were given new contracts. (R.Vol. 2, 45, 52-53). But for the necessity of reducing staff, Petitioner's contract would have been renewed. [R.Vol. 2, 11; Vol. 3 (Jan. 25), 29]. By letter dated May 23, 1984, Petitioner was advised of the nonrenewal "in order that you may undertake to secure other employment if you choose to do so." (P.Exh. 17). Petitioner's teaching position was in fact eliminated at her school for the 1980-81 school year. [R.Vol. 2, 61-62; Vol. 3 (Jan. 24), 24].

On June 3, 1980 — two weeks after the school district had notified Petitioner that her contract would not be renewed — Petitioner appealed the denial of her performance evaluation rating arbitration demand to the Texas Education Agency. (P.Exh. 18A). Respondent agreed to expunge the offending evaluation from its records, and the appeal was dismissed. (5a).

The trial court granted Respondent's motion for directed verdict at the close of Petitioner's proof. (20a). It concluded that under *Connick* v. *Myers*, 461 U.S. 138 (1983) and *Pickering* v. *Board of Education*, 391 U.S. 563 (1968), Petitioner's speech activities did not warrant First Amendment protection because they did not relate to a matter of public concern and because "the essence of the protest" — Petitioner's performance evaluation ratings — did not involve the grievance procedure or school district policy. (16a). The trial court further concluded that the asserted right to redress of grievances "is so dovetailed into" the question of whether Petitioner's speech activities were protected that the two were indistinguishable. (16a). Although the trial court found that the right to redress of grievances "exists for protected speech", it determined that it was obligated by law to rule for Respondent under the relevant circumstances. (16a-17a). Finally, the trial court found no Fourteenth Amendment violation of due process (6a).

Only the redress of grievances issue was raised on appeal. (16a). Because the district court rendered a directed verdict, the appellate court was compelled to "view all of the evidence in the

light of and with all reasonable inferences most favorable" to Petitioner. (6a).

The Court of Appeals for the Fifth Circuit first considered the nature of Petitioner's speech activities and concluded that the trial court was correct in determining that Petitioner's complaint about her performance evaluation ratings was "purely a private matter", and that she was not speaking "as a citizen upon matters of public concern" but only as to "individual personal disputes and grievances" concerning information that "would be of no relevance to the public's evaluation of the performance of governmental agencies." (8a). Thus, as a matter of law Petitioner's complaint was not protected speech under the First Amendment. (8a).

The court of appeals then examined Petitioner's assertion that, even assuming the nature of her speech activities did not entitle her to constitutional protection, nonetheless the First Amendment guarantees her the separate and distinct right to petition for redress of grievances. In concluding that the protection afforded by the petition clause is not entirely discrete from or broader than the other clauses of the First Amendment, the Fifth Circuit found that:

> "None of the Supreme Court cases cited by Day supports the proposition that her speech on a matter of personal concern, the act of an employee addressing her employment supervisors, is protected by the petition clause because she chose to clothe her address to them in a formal grievance, in the absence of any implication of the right to freely assemble or associate."

(10a).

REASON FOR DENYING THE WRIT

THE COURT OF APPEALS DECISION COMPORTS WITH PRINCIPLES ESTABLISHED BY DECISIONS OF THIS COURT

The Court of Appeals squarely addressed Petitioner's contention that her First Amendment right to redress of grievances had been abridged by Respondent, and — as the trial court had done — found the same to be without merit. The appellate court stated that, in asserting that the First Amendment guarantees a separate and distinct right to petition for redress, Petitioner incorrectly assumes that "when a government employer deals with its own employees, the protection afforded by the petition clause is entirely discrete from and broader than the shield afforded by other clauses of the First Amendment, a premise that is undermined by the Supreme Court's repeated references to these clauses as being overlapping." (9a). Quoting from this Court's recent decision in *McDonald* v. *Smith*, 86 L.Ed 2d 384 (1985), the appellate court stated:

> "The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression . . ." "The Petition Clause was inspired by the same ideals of liberty and democracy that gave us the freedom to speak, publish, and assemble. . . . These First Amendment rights are inseparable . . ."

(9a). *Id.* at 388 and 390.

In considering the citations offered by Petitioner in support of her position, the appellate court found that "When the [Supreme] Court has accorded protection to conduct under the petition clause, other first amendment rights, such as the right to assemble, to associate, or to speak freely on a matter of legitimate public concern, were implicated by the conduct in question

and were principal concerns in the Court's decision that the conduct should be protected."[1] (9a-10a).

The Court of Appeals then cited several circuit decisions in which a claim of violation of the right-to-petition clause was supported by the protected exercise of other First Amendment rights, such as freedom to associate,[2] free speech involving a matter of public concern,[3] and freedom to assemble.[4] (10a-11a). Opinions referenced by the appellate court involving facially similar facts include *Anderson* v. *Central Point School District No. 6*, 554 F.Supp. 600, at 606 (D.Or. 1982) (letter to Board addressing athletic policies, a matter of public concern), *Aff'd*, 746 F.2d 505 (9th Cir. 1984) (distinguishing *Connick, supra*, as to the public v. private nature of the speech activities), and *Pilkington* v. *Bevilacqua*, 439 F.Supp. 465 at 474-75 (D.R.I. 1977) (Grievances and letters on administration's policies and conduct,

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[1] Citing, at note 17, *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 907-13, 102 S.Ct. 3409, 3422-27, 73 L.Ed.2d 1215, 1232-36 (1982); *Smith* v. *Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464-66, 99 S.Ct. 1826, 1827-28, 60 L.Ed.2d 360, 363 (1979); *City of Madison* v. *Wisconsin Employees Relations Comm'n*, 419 U.S. 167, 174-75, 97 S.Ct. 421, 426, 50 L.Ed.2d 376, 384 (1976); *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508, 510-11, 92 S.Ct. 609, 611-12, 30 L.Ed.2d 642, 646 (1972); *United Mine Workers, Dist. 12* v. *Illinois State Bar Ass'n*, 389 U.S. 217, 222-23, 88 S.Ct. 353, 356-57, 19 L.Ed. 426, 430-31 (1967); *Adderley* v. *Florida*, 385 U.S. 39, 41-42, 87 S.Ct. 242, 243-44, 17 L.Ed.2d 149, 152 (1966); *Edwards* v. *South Carolina*, 372 U.S. 229, 235-38, 83 S.Ct. 680, 683-85, 9 L.Ed.2d 697, 701-03 (1963); *NAACP* v. *Button*, 371 U.S. 415, 429-30, 83 S.Ct. 328, 336, 9 L.Ed.2d 405, 415-16 (1963); *Thomas* v. *Collins*, 323 U.S. 516, 531-32, 65 S.Ct. 315, 323-24, 89 L.Ed. 430, 440-441 (1945).

[2] *Professional Association of College Educators* v. *El Paso Community College District*, 730 F.2d 258 (5th Cir. 1984).

[3] *McBee* v. *Jim Hogg County, Texas*, 730 F.2d 1009 (5th Cir. 1984) (en banc).

[4] *Henrico Professional Firefighters Association, Local 1568* v. *Board of Supervisors*, 649 F.2d 237 (4th Cir. 1981)

a matter of public concern), *aff'd*, 590 F.2d 386 (1st Cir. 1979) (11a at note 22).

Of the several decisions cited here by Petitioner, the greatest emphasis is placed upon *California Motor Transport Co.* v. *Trucking Unlimited*, 404 U.S. 508 (1982), a decision which the Court of Appeals considered and found to be inapposite because, like other cited opinions of this Court, it involved protection accorded to conduct under the petition clause through the implication of other First Amendment rights such as assembly, association, or of free speech in matters of "legitimate public concern." (9a-10a, and note 17). Simply stated, the Petition Clause, in and of itself, does not give rise to a claim of constitutional abridgment by a public employee whose only basis for complaint is couched in terms of a purely private grievance. As the appellate court found:

> "*Connick* dictates sensitivity to the form and content of the employee's speech. An employee's complaint to her superior on a personal matter is no more a matter of public concern when embodied in a letter to him requesting a hearing than it is when spoken to him."

(13a).

As Petitioner would have it, any public employee has a federally-protected right to assert a matter of purely personal interest by means of the employer's formal grievance procedure, even in situations, as here, where the content of the complaint has previously been determined to fall outside the scope of that procedure. Petitioner has not asserted that she has a right under state law or school district policy to a renewal of her contract. Her position is that the First Amendment guarantees her a renewal in these circumstances merely because she chose — inappropriately — to assert her dissatisfaction with certain performance evaluation ratings by means of a written

grievance. Petitioner offers no cognizable authority for that proposition, and the Court of Appeals has cited a number of decisions of this Court to the contrary.

Petitioner has no constitutionally protected right to have her performance evaluation rating, prepared by her building principal, reviewed by an independent board of arbitration, the final level of appeal under policy. Under *Pickering, supra*, she has a First Amendment right, without fear of reprisal, to speak out freely at a school board meeting about the necessity to include, for the benefit of all teachers, such a grievance in policy, or to organize an assemblage of like-minded teachers to urge that position, and to seek redress of any grievance that results from such abridgment. But under *Connick, supra*, there is no protected right to urge a purely private grievance:

> "When employee speech concerning office policy arises from an employment dispute concerning the very application of that policy to the speaker, additional weight must be given to the supervisor's view that the employee has threatened the authority of the employer to run the office."

75 L.Ed.2d at 724.

The facts in *Connick* are of a piece with those in the instant cause, with the significant exception that Petitioner here has acknowledged that her speech activities involved a matter of purely private concern. Sheila Myers, in opposing her intraoffice transfer, prepared and circulated a questionnaire among coworkers addressing the transfer policy, the need for a grievance committee, and other areas of dissatisfaction. She was terminated because of her refusal to accept the transfer and because circulation of the questionnaire was deemed to be an act of insubordination. Assuming the premise on which Petitioner's position here is grounded, it is certainly arguable that Sheila Myers, by means of her questionnaire, was attempting to "petition the Government for a redress of grievances." Yet this court concluded that:

> " . . . when a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior. *Ct. Bishop* v. *Wood,* 426 U.S. 341, 349-350 (1976)."

75 L.Ed.2d at 720.

Petitioner asserts, erroneously, that nonrenewal of her contract was an act of retaliation against her for having presented written complaints concerning her performance evaluation ratings. Nonetheless, even assuming that Petitioner's assertion is correct, *Connick* is dispositive of her claim:

> "Perhaps the government employer's dismissal of the worker may not be fair, but ordinary dismissals from government service which violate no fixed tenure or applicable statute or regulation are not subject to judicial review even if the reasons for the dismissal are alleged to be mistaken or unreasonable." (citations omitted).

75 L.Ed.2d at 719, 720. Petitioner was untenured, and has not alleged a state right to renewal. Even if the school board's decision was mistaken or unreasonable it cannot give rise to federal court intervention, absent a showing of constitutional deprivation.

Petitioner attempts to draw a distinction between the instant cause and *Renfroe* v. *Kirkpatrick,* 722 F.2d 714 (11th Cir.), *cert. denied,* 105 S.Ct. 98 (1984), a decision strikingly similar in its factual and legal elements. In that case the Court of Appeals, relying on *Connick,* upheld the right of an Alabama school district not to rehire a teacher because she had filed a grievance. The gravamen of the teacher's complaint related to her reduction from full-time to part-time employment status, and the appellate court agreed that such a matter of strictly personal

interest did not amount to protected speech. In examining that opinion, the appellate court below stated that:

> "Like the Elevent Circuit in *Renfroe* v. *Kirkpatrick*, we are hesitant to elevate such an employee's complaint to the level of constitutional protection merely because she has asserted it in the form of a grievance."

(13a).

Petitioner's specious distinction rests upon her assertion that the teacher in *Renfroe* did not process her grievance in strict accordance with school board procedures. Yet the same is also true of Petitioner here. Petitioner was advised repeatedly that performance evaluation ratings were not formally grievable under district policy, and it was explained to her that submission of a written rebuttal to be attached to the evaluation was the appropriate course. (P.Exh. 1, 14, 16); [R.Vol. 2, 66, 135; Vol. 3 (Jan. 24) 54-55]. Petitioner declined to follow that procedure. (R.Vol. 2, 110-111).

CONCLUSION

The decision below conforms precisely to the principles established by this Court in *Connick* and *McDonald*, and is in accord with the denial of writ of certiorari in *Renfroe*.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 84-2119

MAVIS DAY,
Plaintiff-Appellant,
v.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

Aug. 16, 1985

Appeal from the United States District Court
for the Eastern District of Texas

Before RUBIN, WILLIAMS, and DAVIS, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

The first amendment protects freedom of speech and the right to petition the Government for a redress of grievances. An untenured school teacher asserts that these rights were violated when her contract was not renewed because she protested her principal's unfavorable evaluation of her performance. The facts support the district court's conclusion that her actions, whether viewed as speech, petitioning, or both, related only to her

superior's employment decisions that affected her in a purely personal manner not to matters of political, social, or community concern. We affirm his conclusion that the teacher was, therefore, not shielded by the first amendment from the school board's decision not to renew her contract. Constitutional rights deserve solicitous protection but the Constitution does not secure every governmental employee from adverse employment action, and it does not guarantee federal relief to every state employee who is injured, even improperly, by a decision made in the course of an employment relationship.

I.

Mavis Day, an untenured English teacher at Hebert High School in the South Park Independent School District who had been employed for one and two-year periods, filed this suit under the Civil Rights Act, 42 U.S.C. § 1983, asserting that the School District violated her first and fourteenth amendment rights by refusing to renew her contract for the 1980-1981 school year after she complained about her performance evaluation and filed a grievance. Her evidence warrants these factual conclusions.

In March, 1980, the principal of Hebert High made an evaluation of Day's teaching performance for the 1979-1980 school year, as he was required to do for all teachers. In eighteen of the twenty-four skills and personality characteristics evaluated, Day received a satisfactory rating, with positive comments dispersed throughout the evaluation form. In the other six categories, which mainly concern attitude toward school policies and relations with colleagues, Day received an unsatisfactory rating. Some of the principal's comments were: a "[l]ack of control in working with peers is often evident," and "Ms. Day does not always recognize the value of group effort. Often this causes conflicts." He recommended that Day be

transferred because "[t]his teacher may function better in a different environment."

Day and the principal met on March 13 for an evaluation conference, but the principal did not explain the negative aspects of Day's evaluation to her satisfaction. Four days later, Day wrote a letter to the principal detailing her dissatisfaction with the negative evaluation and asking for specific illustrations of how her attitude had been unsatisfactory, so that she might improve it. The principal did not respond to Day's request. Day then challenged the evaluation by invoking the School District's formal grievance procedure.

Statement of Policy 4020, which outlines the formal grievance procedure, defines a grievance in the following manner:

> A "grievance" is a petition by a teacher or a group of teachers based upon an alleged violation, misinterpretation, or inequitable application of any existing policies, rules, or regulations of the school district, but shall not include a petition based upon disciplinary action not directly based on policies of the Board of the District.

Policy 4020 then states that an aggrieved teacher will first discuss a problem with the appropriate principal and that, if the matter is not resolved informally, "formal procedures may then be instituted." After outlining the levels of the grievance structure, Policy 4020 states: "No reprisals of any kind shall be taken by either party or by any member of the Administration against any party in interest, any school representative, or any other participant in the grievance procedure by reason of such participation."

Day invoked Level One of the grievance procedure on March 28, 1980, by submitting her grievance in writing to the principal, and, when the principal did not respond within the time limit dictated by Policy 4020, she sub-

mitted her grievance to the superintendent. Both grievances refer to "solving problems connected with my evaluation." The superintendent responded by letter, stating that Day's complaint was not "grievable."

At trial, the superintendent testified that the School District has a policy against entertaining grievances concerning teacher evaluations because it is the principal's responsibility to evaluate his teachers and officials higher in the administration cannot make a determination of the correctness of the teacher's point of view as opposed to the principal's. The formal grievance procedure might be invoked only if the principal violated Board policy in the process, for example, by refusing to evaluate a teacher or to sign the evaluation form. This was supported by other testimony at trial, although no School District policy statement explicitly makes this distinction.

After Day received the superintendent's response, she requested arbitration, as the procedural guidelines in Policy 4020 permit. Her request was denied by the board of trustees because "dissatisfaction . . . with one's evaluation is not a grievable complaint under board policy #4020, or under any other provision of district policy."

By letter, the assistant superintendent advised Day in May that the School District had decided not to renew her contract for the 1980-1981 school year. At trial, the School District produced testimony that this decision was based on declining enrollment, a decision to eliminate one teaching position in the English Department at Hebert, and the fact that "Day was the least senior among English teachers whose contracts expired in 1980." Day adduced testimony that the contract of an English teacher who had taught at Hebert for only one year had been renewed for the school year and that the principal told this teacher not to "associate with controversial people" because "he was going to rid himself of these controversial people, and unless [she] wanted to be in the same predicament [she] should watch who [she] associated

with." This English teacher testified that she understood that Day was one of these "controversial people."

Day appealed to the State Commissioner of Education challenging the School District's refusal to arbitrate her grievance, and she subsequently appealed the School District's nonrenewal decision. While the appeals were pending, the School District agreed to expunge the 1980 evaluation from its records, and, with Day's consent, the State Commissioner entered an order requiring this and dismissing the appeal concerning the evaluation. After a hearing, the Commissioner rejected Day's challenge to her nonrenewal. Day appealed this decision to the State Board of Education, which found: (1) the School District's policies prohibit retaliation for an employee's exercise of grievance rights; (2) the record contains some evidence supporting the allegation that the principal's recommendation for nonrenewal was given in retaliation for Day's exercise of her grievance rights; and (3) the School District has not conducted a hearing to determine whether Day's nonrenewal resulted from a violation of School District policy. The Board of Education ordered the School District to conduct a hearing on the matter and remanded for that purpose. On remand, the School District decided that Day's claim should be "deferred for arbitration" but that such arbitration should not take place until the case *sub judice* is finally adjudicated.

At trial, Day sought to prove that the School District decided not to renew her contract in order to retaliate against her for filing a grievance and that this violated her first amendment right to petition the government for redress of grievances. After Day rested, the district court granted the School District's motion for a directed verdict. The court concluded that under *Connick v. Meyers*,[1] and *Pickering v. Board of Education*,[2] Day's

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[1] 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

[2] 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

speech activities did not warrant first amendment protection because they did not relate to a matter of public concern and because the "essence of the protest" did not involve the grievance procedure or School District policy. The court concluded that Day's complaint was purely a matter of a disagreement with the merits of the rating. It also found that a substantial reason for the nonrenewal of her contract was that she complained to the principal and filed a grievance and that her contract would have been renewed but for her complaint on "a purely private matter."

The trial court further concluded that the right to redress of grievances "is so dovetailed into" the question of whether the speech is protected that it could not distinguish between them. Although the court found that the right to redress of grievances "exists for protected speech," it concluded that it was obligated by law to rule for the School District in this case. The court also saw no violation of due process in the evidence presented to that point in the case.

Only the redress of grievances issue is raised on appeal: whether a public employee's complaint to her superior about her teaching evaluation is protected by the petition clause of the first amendment. Because the district court rendered a directed verdict, we view all of the evidence "in the light and with all reasonable inferences most favorable to the party opposing the motion." [3]

II.

In order to establish a prima facie case of a violation of the first amendment free speech clause, Day must show that her conduct is constitutionally protected and that it was a substantial or motivating factor in the School Dis-

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[3] *Boeing Co. v. Shipman*, 411 F.2d 365, 374 (5th Cir. 1969); *see also United States v. Vahlco Corp.*, 720 F.2d 885, 889 (5th Cir. 1983).

trict's decision not to renew her contract.[4] When a public employee invokes the first amendment as a basis for reviewing an employment decision made by the governmental employer, however, the protection it accords must be balanced against the government's interest in, and need for, efficient public administration. Thus, in *Pickering v. Board of Education*,[5] the Supreme Court held that a public school teacher cannot be discharged for making statements on a matter of legitimate public concern unless the statements are shown to have interfered with the proper performance of the teacher's daily duties or with the regular operation of the schools, or to have been falsehoods recklessly and knowingly made.[6] In such circumstances, the state's legitimate interest in the efficient operation of its schools does not outweigh the teacher's right to freedom of speech. The predicate for protecting the teacher, however, was the teacher's right, as a citizen, to speak on a matter of public concern as well as the public interest in having free and unhindered debate on matters of public importance.

In *Connick v. Meyers*,[7] the Supreme Court further emphasized the importance of the requirement that the speech in question address a matter of legitimate public concern if it is to be protected by the first amendment freedom of speech clause:

> When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the

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[4] *See Mt. Healthy City Bd. of Educ. v. Doyle*, 429 U.S. 274, 278, 97 S.Ct. 568, 576, 50 L.Ed.2d 471, 478 (1977).

[5] 391 U.S. 563, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968).

[6] *See id.* at 572-74, 88 S.Ct. at 1736-38, 20 L.Ed.2d at 819-20.

[7] 461 U.S. 138, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983).

> name of the First Amendment. . . . [W]hen a public employee speaks not as a citizen upon matters of public interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior.[8]

"Whether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the record as a whole," [9] the Court said.

The district court correctly concluded that Day's complaint was "purely a private matter." She was primarily concerned about her principal's negative evaluation of her performance and his failure to explain her evaluation to her satisfaction. This is evident from her letter of complaint to the principal, her letters written to the principal and superintendent invoking the formal grievance procedure, and her testimony at trial. She did not speak "as a citizen upon matters of public concern," [10] but only as an individual "with individual personal disputes and grievances" concerning "information [that] would be of no relevance to the public's evaluation of the performance of governmental agencies." [11]

As a matter of law, therefore, Day's complaint about her individual teaching evaluation and the principal's explanation of it is not protected speech under the first amendment.[12] It follows that, even if the School District's

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[8] *Id.* at 146-47, 103 S.Ct. at 1689-90, 75 L.Ed.2d at 719-20.

[9] *Id.* at 147-48, 103 S.Ct. at 1690, 75 L.Ed.2d at 720.

[10] *Id.* at 147, 103 S.Ct. at 1690, 75 L.Ed.2d at 720.

[11] *Davis v. West Community Hosp.*, 755 F.2d 455, 461 (5th Cir. 1985).

[12] *See id.* at 462.

refusal to renew Day's contract was based upon her complaint, and not upon declining enrollment, and was mistaken or unreasonable, she was not entitled to first-amendment-free-speech protection.[13] This conclusion is in accord with the recent Eleventh Circuit decision in *Renfroe v. Kirkpatrick*.[14]

III.

Day asserts, however, that the first amendment guarantees her the separate and distinct right to petition for a redress of grievances and that this right was violated when the School District decided not to renew her contract. This assumes that, when a government employer deals with its own employees, the protection afforded by the petition clause is entirely discrete from and broader than the shield afforded by the other clauses of the first amendment, a premise that is undermined by the Supreme Court's repeated references to these clauses as being overlapping.

"The right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression," the Supreme Court said in *McDonald v. Smith*,[15] only a few weeks ago. "The Petition Clause," it continued, "was inspired by the same ideals of liberty and democracy that gave us the freedom to speak, publish, and assemble. . . . These First Amendment rights are inseparable. . . ." [16]

When the Court has accorded protection to conduct under the petition clause, other first amendment rights,

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[13] *See Connick*, 461 U.S. at 147, 103 S.Ct. at 1690, 75 L.Ed.2d at 720.

[14] 722 F.2d 714 (11th Cir. 1984).

[15] —— U.S. ——, 105 S.Ct. 2787, 85 L.Ed.2d —— (1985).

[16] *Id.* at ————, 105 S.Ct. at 2789; *see also id.* at ——, 105 S.Ct. at 2791 (Brennan, J., concurring).

such as the right to assemble, to associate, or to speak freely on a matter of legitimate public concern, were implicated by the conduct in question and were principal concerns in the Court's decision that the conduct should be protected.[17] None of the Supreme Court cases cited by Day supports the proposition that her speech on a matter of personal concern, the act of an employee addressing her employment supervisors, is protected by the petition clause because she chose to clothe her address to them in a formal grievance, in the absence of any implication of the right to freely assemble or associate.

Other decisions that rest in part on the right-to-petition clause involve the exercise of first amendment rights in addition to the right to petition. For example, *Professional Association of College Educators v. El Paso Community College District*[18] addressed discrimination against union members for exercising their right to associate,[19] and *McBee v. Jim Hogg County, Texas*[20] involved an employee's complaint to county authorities about the

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[17] *See, e.g., NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 907-13, 102 S.Ct. 3409, 3422-27, 73 L.Ed.2d 1215, 1232-36 (1982); *Smith v. Arkansas State Highway Employees, Local 1315*, 441 U.S. 463, 464-66, 99 S.Ct. 1826, 1827-28, 60 L.Ed.2d 360, 363 (1979); *City of Madison v. Wisconsin Employees Relations Comm'n*, 429 U.S. 167, 174-75, 97 S.Ct. 421, 426, 50 L.Ed.2d 376, 384 (1976); *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 92 S.Ct. 609, 611-12, 30 L.Ed.2d 642, 646 (1972); *United Mine Workers, District 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222-23, 88 S.Ct. 353, 356-57, 19 L.Ed.2d 426, 430-31 (1967); *Adderley v. Florida*, 385 U.S. 39, 41-42, 87 S.Ct. 242, 243-44, 17 L.Ed.2d 149, 152 (1966); *Edwards v. South Carolina*, 372 U.S. 229, 235-38, 83 S.Ct. 680, 683-85, 9 L.Ed.2d 697, 701-03 (1963); *NAACP v. Button*, 371 U.S. 415, 429-30, 83 S.Ct. 328, 336, 9 L.Ed.2d 405, 415-16 (1963); *Thomas v. Collins*, 323 U.S. 516, 531-32, 65 S.Ct. 315, 323-24, 89 L.Ed. 430, 440-41 (1945).

[18] 730 F.2d 258 (5th Cir. 1984).

[19] *Id.* at 263.

[20] 730 F.2d 1009 (5th Cir. 1984) (en banc).

unfairness of a political patronage system of public employment, a matter of public concern that implicates political speech and association. Similarly, *Henrico Professional Firefighters Association, Local 1568 v. Board of Supervisors*,[21] in which a union representative was foreclosed from addressing a municipal body in a limited public forum while other persons were not, also involved the right to associate, assemble, and speak freely. Other lower court cases evidence a similar admixture of the right to petition and the right to speak on matters of public concern.[22]

A few lower court cases decided before *Connick* espouse the proposition that "a petition by a federal employee to one above him in the executive hierarchy is covered by the First Amendment." [23] Aside from the shadow placed on these decisions by *Connick*, we find them distinguishable on their facts or unpersuasive in their reasoning. In *Swaaley v. United States*,[24] decided in 1967, the Court of Claims considered a letter to the Secretary of the Navy, in which an employee who was later discharged from his job in a Navy shipyard complained of favoritism, pay-offs, and wrongdoing in the granting of promotions at the shipyard.[25] That letter, like the one in *Pickering*, addressed a matter of legitimate public concern.

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[21] 649 F.2d 237 (4th Cir. 1981).

[22] *See Anderson v. Central Point School Dist. No. 6*, 554 F. Supp. 600, 606 (D.Or. 1982) (letter to Board addressing athletic policies, a matter of public concern), *aff'd*, 746 F.2d 505 (9th Cir. 1984) (distinguishing case from *Connick* and complaint on matters of personal interest); *Pilkington v. Bevilacqua*, 439 F. Supp. 465, 474-75 (D.R.I. 1977) (grievances and letters on administration's policies and conduct, a matter of public concern), *aff'd*, 590 F.2d 386 (1st Cir. 1979).

[23] *Swaaley v. United States*, 376 F.2d 857, 863, 180 Ct.Cl. 1 (1967).

[24] 376 F.2d 857 (Ct.Cl. 1967).

[25] *Id.* at 858.

In *Albright v. United States*,[26] decided in 1970, the District of Columbia Circuit held that a meeting of federal employees to complain to an official in the executive hierarchy about a work-related grievance was an exercise of the employees' first amendment right to petition. The federal superior had secretly videotaped the meeting at which the employees met with their personnel officer to complain about a policy decision affecting their whole division to reclassify and downgrade their positions. The Privacy Act prohibited the employer's unauthorized maintenance of records of an employee's exercise of his first amendment rights, and the court, therefore, was called upon to decide only whether the meeting was an *exercise* of the employees' first amendment rights, not whether there was any violation of them. Whether employees who meet to protest to their superior a division-wide policy decision that affects them adversely are protected from being discharged for doing so by the first amendment's petition clause, post-*Connick*, is a matter that we need not here decide. It is sufficient for us to note that *Albright* does not address the discharge of a government employee or the nonrenewal of his contract for the exercise of his first amendment rights. It also does not address whether a government employee who individually makes a personal complaint to his immediate superior and then files a grievance with him is wholly shielded by the right to petition, absent the protection of other first amendment rights. We, therefore, find it inapposite to the case at hand. We also find the 1980 district court decision in *Johnson v. San Jacinto Junior College*[27] unpersuasive both because it was decided before *Connick* and for the reasons given in our earlier discussion of other cases.

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[26] 631 F.2d 915 (D.C. Cir. 1980).

[27] 498 F. Supp. 555 (S.D.Tex. 1980).

Bowen v. Watkins,[28] decided by this circuit, does not deal with the issue raised here. Two police officers who were not selected to fill the position of chief of police contended that their request for a hearing before the City Council and their later filing of suit were protected by the first amendment. The trial court's ruling that the hearing request was protected was not appealed.[29] The district court had not specifically ruled on whether the plaintiffs' filing of their suit was protected, but all parties had assumed that it was.[30] Using the balancing analysis required by *Pickering*, we noted that both the City Council hearing and the filing of the suit involved the same amount of disruption of close working relationships and both involved the public interest not only in resolving the controversy but also in ensuring that the proper officers were promoted.[31] *Bowen* did not, therefore, hold that a request for a hearing on a matter of entirely private concern is protected by the petition clause or any other first amendment right.

Connick dictates sensitivity to the form and content of the employee's speech.[32] An employee's complaint to her superior on a personal matter is no more a matter of public concern when embodied in a letter to him requesting a hearing than it is when spoken to him. Like the Eleventh Circuit in *Renfroe v. Kirkpatrick*,[33] we are hesitant to elevate such an employee's complaint to the level of constitutional protection merely because she has asserted it in the form of a grievance.

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[28] 669 F.2d 979 (5th Cir. 1982).

[29] *Id.* at 982.

[30] *Id.* at 892 n. 2.

[31] *Id.*

[32] 461 U.S. at 147, 103 S.Ct. at 1690, 75 L.Ed.2d at 720.

[33] 722 F.2d 714 (11th Cir. 1984).

Day's procedural due process claim is not before us on appeal. As we have noted, the State Board of Education has ruled that the School District's policies prohibit retaliation for an employee's exercise of grievance rights and has remanded Day's case to the School District so that it may conduct a hearing on this matter. We, therefore, do not determine whether School District policy gave Day the right to file a grievance in this case or any of the related procedural matters, nor whether Day has a cause of action arising out of the no-reprisal sentence in Policy 4020.

We also find it unnecessary to consider, and intimate no opinion about, the situation that would be presented if a government employee sought assistance from a legislator or a member of the executive branch in a position to accord her relief who was not in the direct supervisory hierarchy.

For these reasons, the judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-82-501

MAVIS DAY

vs.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT

[Filed Feb. 8, 1984]

ORAL OPINION AND FINDINGS OF FACT
AND CONCLUSIONS OF LAW

* * * *

THE COURT: Please be seated. The explanation for the Jury, in any civil case our procedure either permits or requires certain motions to be filed at various stages of the proceeding. One has been filed by the Defendant at the conclusion of the Plaintiff's case that the Court is going to grant. And I think an explanation is due the Jury.

Counsel, and I want the Appellant Court to have a full understanding of the Court's reason in the Court's holding on this, and therefore I am incorporating some findings.

The Court is persuaded that the Plaintiff has made a prima facie case that a substantial reason, if not the primary cause for Plaintiff's being selected for nonrenewal

was the fact that the Plaintiff complained of a rating given to Plaintiff by Mr. Bryant and filed a grievance. The Court finds that the Plaintiff was well qualified for the position that she was holding and was not renewed when a selection was made of other persons with less seniority and perhaps less qualifications, were selected in her stead. The reason that the Court has granted the Defendant's motion is, I have reviewed the Connick case and have again read Pickering and I am persuaded that the contents of the speech that was involved in this case does not relate to matters of public concern and the essence of the protest did not involve the grievance procedure and it did not involve the school policy.

It was purely a matter of a disagreement of the merits of the rating. And I make no finding or comments regarding whether the Plaintiff was justified or not justified in complaining about the rating. But I am merely observing that the protest related to the rating in itself as opposed to procedures or matters that this Court can interpret to be areas of public concern, and therefore was vital to the point that I feel it's not protected under the First Amendment.

The point that Plaintiff's Counsel has, I think extremely ably presented relating to the right to redress is so dovetailed into that question that I am unable to distinguish them. I think the right for redress of grievances does exist and it certain exists for protected speech; in fact is in fact being utilized in this case apparently successfully, at least to some extent by the Plaintiff as it relates to the merits of her claim that she was unfairly evaluated. I find no violation of due process from what we have heard in the case at this point.

I wanted to place on the record the Court's reasoning for the Court's ruling is interpreted to permit a non-renewal or termination for the exercise of free speech that doesn't ascend to the area of being protected. That may very well be true but the Court thinks it's probably considerable merit in the Plaintiff's complaint, but that

under the law as I understand it to be, I am obligated to rule for the Defendant in this case.

So with that explanation, your job is over, Ladies and Gentlemen, and it's not necessary for you then to make a decision on the facts of this case.

Counsel, have I adequately protected your record?

MR. HALL: Yes, Your Honor, you have, and the only matter of concern that I have and I'm not sure, and as I start to say it, it is not—may not be appropriate and I suppose it doesn't matter now as far as being in the presence of the Jury. The Court, and I don't know whether it's necessary for the Court to say anything about the pendant claims in this case or not.

THE COURT: I, of course, considered that that is a matter I think properly should be left to the procedures where they are being pursued.

MR. HALL: All right, sir.

THE COURT: All right, anything further, gentlemen?

MR. HUNT: Your Honor, my first question, or your answer to my first question may answer my second one, but would it be appropriate or permitted to submit proposed supplemental findings and conclusions for the Court's consideration?

THE COURT: I will consider any that you submit. I have tried to fairly and fully state the Court's findings and conclusions on the record.

MR. HUNT: Then if I might proceed to my second question, which is that under the Supreme Court cases you cited there is a third test in it, might be helpful to the Board for you to have a finding if the Court feels it should do so at this time, as to the question of whether Mrs. Day would have been offered a new contract but for the conduct which she asserted to be protected.

THE COURT: I am prepared to find for the purposes of the motion that she would have been renewed but for the fact that she complained to the principal, Mr. Bryant, on a purely private matter that was not a public,

that was not of public concern and that is the reason I thought I made that clear earlier when I said that, that her complaints regarding the evaluation was a substantial factor, if not the sole factor in her nonrenewal.

MR. HUNT: That is correct. And so the Court would consider proposed supplemental findings?

THE COURT: I will consider anything you submit.

MR. HUNT: Thank you.

THE COURT: Ladies and Gentlemen, I appreciate your consideration and attention to this case. The Jury will be excused and we are in recess.

(Whereupon the hearing on this matter was concluded.)

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 84-2119

D.C. Docket No. B-82-501-CA

MAVIS DAY,
Plaintiff-Appellant,

versus

SOUTH PARK INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

Appeal from the United States District Court for the Eastern District of Texas

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Before RUBIN, WILLIAMS, and DAVIS, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal, to be taxed by the Clerk of this Court.

August 16, 1985

Issued as Mandate: Sept. 9, 1985

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

Civil Action No. B-82-501

MAVIS DAY

vs.

SOUTH PARK INDEPENDENT SCHOOL DISTRICT

[Filed Feb. 8, 1984]

JUDGMENT

Comes Now the Court, sua sponte, and vacates its earlier judgment of January 30, 1984, and in its place enters the following judgment.

On January 25, 1984, this Court granted defendant's Motion for a Directed Verdict for the reasons stated at that time. Accordingly, it is therefore

ORDERED, ADJUDGED and DECREED that Judgment be entered for the defendant and that the plaintiff shall bear all costs.

Further ORDERED that the Judgment of January, 30, 1984 is vacated.

SIGNED and ENTERED this 7th day of February, 1984.

/s/ Robert M. Parker
United States District Judge